STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Cooper, P.J., and Hoekstra and Markey, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

RODNEY WILLIAMS,

Defendant-Appellee.
_____/

Supreme Court No. 123537

Court of Appeals No. 232827

Lower Court No. 00-4026

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DEFENDANT-APPELLEE'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

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STATEMENT OF JURISDICTION

Defendant-Appellee accepts Plaintiff-Appellant's Statement of Jurisdiction.

STATEMENT OF QUESTION PRESENTED

I. DID THE TRIAL JUDGE DENY DEFENDANT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO COUNSEL BY FAILING TO ENSURE THAT HIS PURPORTED WAIVER OF COUNSEL WAS UNEQUIVOCAL, VOLUNTARY, KNOWING AND INTELLIGENT?

Defendant-Appellee answers, Yes.
Plaintiff-Appellant answers, No.
The Trial Court answered, No.
The Court of Appeals answered, Yes.

STATEMENT OF FACTS

Defendant-Appellee accepts Plaintiff-Appellant's Statement of Facts, but adds the following:

After the lunch break on the second day of trial, defense counsel advised the court that Defendant Williams wanted to address the court (1a). Defendant told the trial judge that he wanted to terminate defense counsel's representation:[1]

> ***2a** "THE DEFENDANT: Good morning [sic], your Honor. Your Honor, due to circumstances, I would like to terminate my representation of my attorney, Mr. Donald A. Cook, due to the fact that Mr. Cook has failed to represent me, appropriately. He has allowed the prosecution witnesses to testify. And he has failed to ask them pertinent questions that's pertaining to my life. Also, he has allowed the first witness to be excused from this courtroom. And I am entitled, I hope, to a proper, fair representation, and also a fair trial.
>
> And, also, if the Court deems proper, with all honor and due respect, I would like to have – I do not wish to adjourn this proceeding, because I know this has been going on all along. But I would like to represent myself, in proper person [sic]. And, also if-- *** --if, only if this Court would agree orally, and a written consent, please, that Mr. Florian Mager be brought back to court, and allow me to recross-examine him, as well as Ms. Tracey Jo Williams. This is for my life. And I accept and I appreciate all that Mr. Donald Cook has done, but these records have facts here, statements that cannot be denied, reports from the Detroit police officers, a Mr. ***3a** Jerry Jones, making statements, himself, and Mr. Florian Mager, that have not been brought out. And I can do that.
>
> THE COURT: Anything else?
>
> THE DEFENDANT: No, ma'am.

[1] The entire colloquy between the trial judge and Defendant went on for seventeen pages and is set forth in Plaintiff-Appellant's Appendix (1a-17a). In the interest of brevity, undersigned counsel will not repeat the entire colloquy here. However, the summary version is no substitute for the entire colloquy, and a review of all seventeen pages is essential.

THE COURT: Mr. Cook, do you wish to say anything?

THE DEFENDANT: I would like to keep –

THE COURT: (Interposing) Pardon?

THE DEFENDANT: I would also like to keep Mr. Cook as an advisor, and a counselor, if he would accept.

THE COURT: Mr. Cook, do you want to say anything?

MR. COOK: Well, your Honor, I have been representing Mr. Williams to the best of my ability. I believe that I cross-examined those witnesses appropriately. I do believe a person has a right to represent themselves, if they wish to do so, although I personally think that would be foolish.

It's my understanding that both of those witnesses are now done. I don't know that in fact it would be possible to recall them. And that's really about all I have to say, your Honor.

THE COURT: All right. The Court –

THE DEFENDANT: (Interposing) May I respond, ***4a** your Honor?

THE COURT: What would you like to say?

THE DEFENDANT: Your Honor, at the close of lunch, I had not heard, on record, that Ms. Tracey Jo Williams was excused from all testimony. As a matter of fact, she just went down, and then you adjourned court. So, I wasn't under the impression that Tracey Jo Williams had been excused, also, on record, as the first witness. And Mr. Donald Cook, he's been a great lawyer, but this is for my life. And I can bring facts out that haven't came out. And they're right here. And it won't take a lawyer to do that." (2a-4a).

After the trial judge indicated that the Rules of Evidence were applicable and binding, the prosecutor voiced a "strenuous" objection to Defendant's request (4a-5a). When the trial judge mentioned the "great risks" involved with self-representation, the following exchange occurred:

"THE DEFENDANT: Well, your Honor, I know ya' all could possibly get me another attorney, but it would be another court-appointed attorney.

> THE COURT: No, that's not an option. We're in the middle of trial.
>
> THE DEFENDANT: Well, good.
>
> THE COURT: We're almost over. You are not getting another attorney.
>
> THE DEFENDANT: Well, then I'm ready – I'd rather represent myself, your Honor, and take –" (8a)

The trial judge advised Defendant of the serious risks of self-representation, his lack of training in the Rules of Evidence, the inability to claim later that he was ineffective, and the potential penalties (at this juncture the trial judge told Defendant that for felony murder the maximum was life) (4a-11a). The trial court also noted that Mr. Cook was Defendant's second attorney (6a-7a).

During the waiver proceedings, Defendant discussed his request to recross-examine Mr. Mager and Ms. Williams. The trial judge cut him off and stated:

> ***10a** THE COURT: (Interposing) No, we're not bringing in those other witnesses, we're continuing with the trial. It's the Court's opinion that you had proper representation. Mr. Cook is an excellent attorney. And we are not starting the trial over, we are continuing with the trial. You can still have Mr. Cook, if you want, or you can continue and represent yourself, but you ***11a** are taking serious risks. You do not know the Rules of Evidence. You are emotionally involved in this case, as I would expect you to be. And you could be harming yourself by representing yourself. And I want you to understand all that. Do you understand that?
>
> THE DEFENDANT: Your Honor, right here, at the preliminary examination, under cross-examination by Lawrence A. Burgess, my first attorney –
>
> THE COURT: (Interposing) I just asked --
>
> THE DEFENDANT: (Interposing) Ma'am?
>
> THE COURT: Go ahead." (10a-11a).

Defendant then continued with his attempt to explain why defense counsel was ineffective in failing to adequately cross-examine Mr. Florian Mager (11a-12a). At this juncture, the prosecutor provided the trial judge with his version of Mr. Mager's testimony at the preliminary examination (12a). After the prosecutor finished and the trial judge started to rule, Defendant Williams asked if he could read it (the portion of the preliminary examination transcript that the prosecutor mentioned)(12a). It was at this point that the trial judge appeared to lose all patience with Defendant Williams:

> "THE COURT: All right. I'm going to –
>
> THE DEFENDANT: (Interposing) May I read it?
>
> THE COURT: No. I'm going to ask you one more time. Do you want to represent yourself? Because we're bringing in the jury.
>
> THE DEFENDANT: Your Honor, with all due respect –
>
> THE COURT: (Interposing) I asked you one question.
>
> THE DEFENDANT: Your Honor, this is my life.
>
> THE COURT: Do you want to represent yourself?
>
> THE DEFENDANT: Your Honor? Please. I'm pleadin' with you, your Honor.
>
> THE COURT: Answer my question.
>
> THE DEFENDANT: What's a little minute in my life? Please.
>
> THE COURT: Answer my question.
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: All right. Let's bring in the jury.
>
> THE DEFENDANT: Your Honor?
>
> THE COURT: Sit down.

> THE DEFENDANT: Yes, ma'am.
>
> THE DEPUTY: Sit down.
>
> THE COURT: Remember, you disrupt this courtroom – you disrupt this courtroom one more time and you're going to be out of here. And then I'll bring you back in, and Mr. Cook will be representing you." (12a-14a).

Immediately after the jury was brought back into the courtroom and the trial judge advised the jury that Defendant had chosen to represent himself, with Mr. Cook acting as standby counsel, the prosecutor asked to approach the bench (14a). Thereafter, the jury was excused from the courtroom, and the trial judge corrected her earlier information about the penalty for felony murder and informed Defendant that the life sentence was mandatory, with the minimum and maximum sentence being life (14a-15a).

SUMMARY OF ARGUMENT

Defendant-Appellee submits that the purported waiver of his constitutional right to counsel was invalid for a number of reasons. First, it was not unequivocal. Defendant attempted to broach the possibility of substitute counsel; however, the trial court swiftly dismissed this option. Further, at the end of the colloquy, Defendant asked to verify the prosecutor's assertion that the preliminary exam transcript did not support Defendant's memory of Mr. Mager's testimony; however, the trial court refused to accommodate this request and failed to address Defendant's apparent equivocation. Finally, Defendant requested standby counsel, which rendered the request for self-representation equivocal as a matter of law.

Second, Defendant submits that the attempted waiver was not fully knowing, intelligent, and voluntary. The trial judge's refusal to grant Defendant's request to read a page of the preliminary examination transcript and her pressure at the end of the proceeding did not allow Defendant to make a fully informed and voluntary decision.

Third, it is Defendant-Appellee's position that the waiver proceeding spanned the entire seventeen pages. The waiver proceeding was interspersed with discussions about Defendant's dissatisfaction with defense counsel's cross-examination of witnesses and whether the witnesses would be recalled. The majority of the Court of Appeals below correctly noted that Defendant had grave concerns about making a decision without verifying the prosecutor's statement about the transcript. Plaintiff-Appellant and Judge Hoekstra in his dissenting opinion incorrectly attempt to dissect the seventeen pages of colloquy into two separate and unrelated parts – the issue of self-representation and the issue of recalling witnesses.

Finally, the error here is both jurisdictional and structural error that is not subject to harmless error analysis.

I. THE TRIAL JUDGE DENIED DEFENDANT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO COUNSEL BY FAILING TO ENSURE THAT HIS PURPORTED WAIVER OF COUNSEL WAS UNEQUIVOCAL, VOLUNTARY, KNOWING AND INTELLIGENT.

A. INTRODUCTION.

The relevant facts involved have been set forth in the Statement of Facts, supra, and are incorporated herein.

Defendant submits that the trial judge's failure to ensure that his purported waiver of counsel was unequivocal, voluntary, knowing and intelligent violated his constitutional right to counsel, and this Court must reverse Defendant's convictions. US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 20; MCL 763.1; MCR 6.005; Faretta v California, 422 US 806 (1975); People v Adkins (After Remand), 452 Mich 702 (1996); People v Dennany, 445 Mich 412 (1994); People v Anderson, 398 Mich 361 (1976). The majority of the Court of Appeals below correctly found that Defendant's "waiver of his right to counsel was not unequivocal, fully knowing, intelligent and voluntary." (21a)

B. STANDARD OF REVIEW.

Plaintiff-Appellant argues that the standard of review is abuse of discretion and cites People v Ahumada, 222 Mich App 612, 617 (1997). However, Defendant submits that the determination of a waiver of the constitutional right to counsel is a question of law, Brewer v Williams, 430 US 387, 397 fn 4 (1977), and thus is reviewed de novo. See also United States v Kaczynski, 239 F3d 1108, 1116 (CA 9, 2001)(the standard of review regarding the waiver of the constitutional right to counsel is de novo). But see Fields v Murray, 49 F3d 1024, 1030-1032

(CA 4, 1995)(en banc). Under either of these standards, whether de novo or abuse of discretion, Defendant Williams is entitled to reversal of his convictions and appointment of a new lawyer before his next trial.

C. DISCUSSION

The right to the assistance of counsel is necessary to ensure that a criminal defendant receives a fair trial, that all defendants stand equal before the law, and that justice is served. Gideon v Wainwright, 372 US 335, 344 (1963). A criminal defendant in Michigan is guaranteed this fundamental right to the assistance of counsel by both Article 1, § 20 of the Michigan Constitution and the Sixth Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment. Gideon v Wainwright, 372 US at 339-343; Johnson v Zerbst, 304 US 458, 462 (1938).

The Sixth Amendment, Article 1, § 13 of the Michigan Constitution, and MCL 763.1 also give a defendant the right to conduct his own defense.[2] The Sixth Amendment does not explicitly establish this right but it is "necessarily implied by the structure of the Amendment." Faretta v California, 422 US at 819.

In Faretta v California, supra, the United States Supreme Court found that the right of self-representation is implicitly guaranteed in the Sixth Amendment to the United States Constitution. The Court found, however, that in exercising the right of self-representation, a

[2] Const 1963, art 1, §13 provides: "A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney." MCL 763.1 provides, "On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have a right to produce witnesses and proofs in his favor, and meet the witnesses who are produced against him face to face."

defendant waives his Sixth Amendment right to counsel, and that a knowing and intelligent waiver is an essential prerequisite:

> "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forego those relinquished benefits. Johnson v Zerbst, 304 US [458] 464-465 [58 SCt 1019; 82 L Ed 1461 (1938)]. Cf. Von Moltke v Gillies, 332 US 708, 723-724 [68 S Ct 316; 92 L Ed 309 (1948)] (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' Adams v United States ex rel McCann, 317 US [269] 279 [63 S Ct 236; 87 L Ed 268 (1942)]." Faretta v California, supra, 422 US 834-835.

The Sixth Amendment assures that an individual may not be deprived of his life or liberty unless he has counsel or has knowingly, intelligently and voluntarily waived the right to assistance of counsel. Johnson v Zerbst, supra; Moore v Michigan, 355 US 155 (1957). In addressing the issue of waiver of counsel, the United States Supreme Court stated in Zerbst, supra, that courts must indulge every reasonable presumption against waiver of fundamental rights. The waiver must be an intentional relinquishment or abandonment of a known right or privilege. The Zerbst Court further stated that the determination of whether there has been a knowing, intelligent and willing waiver is to be made by the trial court and must appear on the record. Waiver is not permitted to be presumed from a silent record; it must appear affirmatively that the accused was offered counsel but intelligently and understandingly rejected the offer. Id. at 304 US 464-465.

In Von Moltke v Gillies, 332 US 708 (1948), the defendant signed a paper prior to trial that purported to waive her right to counsel. The Supreme Court reversed, finding that the

defendant had been unduly pressured into signing the waiver and that the defendant, who spoke German, may not have understood the words used in the written waiver. In writing for a plurality of the court, Justice Black stated:

> "[I]n light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." Id. at 332 US 723-724.

In United States v McDowell, 814 F2d 245 (CA 6, 1987), the Sixth Circuit adopted the model inquiry set forth in 1 Bench Book for United States District Judges (3d ed), 1.02-2 to 1.02-5.[3] The Sixth Circuit requires a review of the entire record to ascertain if an accused made an

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[3] The Bench Book guidelines read as follows:

When a defendant states that he wishes to represent himself, you should ... ask questions similar to the following:
(a) Have you ever studied law?
(b) Have you ever represented yourself or any other defendant in a criminal action?
(c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.)
(d) You realize, do you not, that if you are found guilty of the crime charged in Count I the court must impose an assessment of at least $50 ($25 if a misdemeanor) and could sentence you to as much as ___ years in prison and fine you as much as $___?
(e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?
(f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.
(g) Are you familiar with the Federal Rules of Evidence?
(h) You realize, do you not, that the Federal Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?
(i) Are you familiar with the Federal Rules of Criminal Procedure?

"informed insistence upon self-representation" as a precondition to a valid waiver. United States v Miller, 910 F2d 1321, 1324 (CA 6, 1990). In Fowler v Collins, 253 F3d 244 (CA 6, 2001), the Sixth Circuit emphasized the protective role of the trial court to ensure that a waiver of counsel is appropriate and emphasized the trial court's obligation to maintain the integrity of the Sixth Amendment. 253 F3d at 249. The Sixth Circuit cited Von Moltke v Gillies, supra, with approval and the guidelines the Supreme Court set forth in Von Moltke for courts to consider in accepting a waiver of the right to counsel. 253 F3d at 249-250 (citing Von Moltke, 332 US at 724).

In Michigan, the requisite inquiry has been established through a long line of cases.In People v Anderson, supra, the Court addressed how a trial judge should deal with a request by a defendant for self-representation. The Court imposed three requirements that must be met before a trial court could grant a defendant's request for self-representation:

(j) You realize, do you not, that those rules govern the way in which a criminal action is tried in federal court?
(k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.
(l) (Then say to the defendant something to this effect):
I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself.
(m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?
(n) Is your decision entirely voluntary on your part?
(o) If the answers to the two preceding questions are in the affirmative, [and in your opinion the waiver of counsel is knowing and voluntary,] you should then say something to the following effect:
"I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself."
(p) You should consider the appointmentof standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself. Guideline For District Judges from 1 Bench Book for United States District Judges 1.02-2 to -5 (3d ed. 1986).

"**First, the request must be unequivocal.** This requirement will abort frivolous appeals by defendants who wish to upset adverse verdicts after trials at which they had been represented by counsel.

***

Second, once the defendant has unequivocally declared his desire to proceed pro se **the trial court must determine whether defendant is asserting his right knowingly, intelligently and voluntarily**. Faretta, supra. at 422 US 835, 95 S Ct 2525; Holcomb, supra, 395 Mich at 337, 235 NW2d 343. **The trial court must make the pro se defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.** Id. Defendant's competence is a pertinent consideration in making this determination. Westbrook v Arizona, 384 US 150, 86 S Ct 1320, 16 L Ed 2d 429 (1966). But his competence does not refer to legal skills, '[f]or his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself. Faretta, supra.

The **third** and final requirement is that **the trial judge determine that the defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business.** The people would have us announce a guideline which would preclude the assertion of the right to proceed without counsel if it is not made before the trial begins. We cannot accede to this request. Although the potential for delay and inconvenience to the court may be greater if the request is made during trial, that will not invariably be the case." People v Anderson, supra, 367-368 (emphasis added).

Compliance with MCR 6.005(D) and (E) is also required. People v Adkins, supra, 722.

The court rule provides as follows:

"(D) Appointment or Waiver of a Lawyer. *** The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

(E) Advice at Subsequent Proceedings. If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,

(1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
(2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one."

Both the Sixth Circuit and this Court have adopted the substantial compliance test. United States v McDowell, 814 F2d at 250; United States v Miller, 910 F2d at 1324; People v Adkins, supra, 726-727. In Michigan, trial courts are required to substantially comply with the substantive requirements of both Anderson and MCR 6.005(D). People v Adkins, supra, 726. This Court in Adkins, defined substantial compliance as follows:

"Substantial compliance requires that the court discuss the substance of both Anderson and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures. The nonformalistic nature of a substantial compliance rule affords the protection of a strict compliance rule with far less of the problems associated with requiring courts to engage in a word-for-word litany approach. Further, we believe this standard protects the 'vital constitutional rights involved while avoiding the unjustified manipulation which can otherwise throw a real but unnecessary

> burden on the criminal justice system." People v Adkins, supra, 726-727.

This Court in Adkins, supra, 723-724, addressed an effective waiver of counsel at length:

> "Further, the effectiveness of an attempted waiver does not depend on what the court says, but rather, what the defendant understands.[fn 22]. Consequently, other facts, such as evidence of a defendant's intentional manipulation or delay of the court proceedings as a tactical decision may favor a judicial finding of a knowing and intelligent waiver. United States v Sandles, 23 F3d 1121, 1129 (CA 7, 1994).[fn 23].
>
> ---
>
> fn 22 See also Fitzpatrick v Wainwright, 800 F2d 1057, 1065 (CA 11, 1986). Merely going through the requirements without sensitivity to the defendant's reaction to these issues is insufficient.
>
> fn 23 United States v Bell, 901 F2d 574, 579 (CA 7, 1990)(the defendant's decision to proceed in propria persona as a tactical decision was a relevant factor in establishing a knowing waiver)."

This Court also instructed how a trial court should deal with "red flags" that might occur during the attempted waiver:

> "Red flags" that indicate a defendant's uncertainty regarding any of the questions the court uses to facilitate the defendant's understanding of the waiver requirements must be addressed by the trial judge. The judge must be able to ease the defendant's uncertainty after a reasonable inquiry, or the judge should deny the defendant's request to proceed in propria persona." People v Adkins, supra, 725 fn 25.

This Court in Adkins recognized the Catch 22 position faced by trial judges in the waiver of counsel setting, and the concerns voiced by the Plaintiff-Appellant in the instant case – that a defendant may manipulate the system, that a defendant may seek to delay the court proceedings, that a "savvy defendant" may use the competing rights to counsel and to self-representation "as a means of securing an appellate parachute," and that the criminal justice system may be unnecessarily burdened. People v Adkins, supra, 724-727. This Court made it clear that to

combat these problems, it was setting forth "the judicial inquiry required before a defendant's waiver of counsel is justified" and that its adoption of the substantial compliance test was an effective way to address these concerns. Adkins, supra, 725-727. See also People v Dennany, supra, 438 (Griffin, J.)("Obviously,the most effective way for a trial court to safeguard against the opening of an appellate parachute is to comply with the court rules and Anderson."). Cf. People v Dennany, supra, 456-458 (Cavanagh, J. concurring in part and dissenting in part)(strict compliance would prevent an appellate parachute).

Finally, this Court instructed trial judges on how to deal with any uncertainty that arises during the attempted waiver:

> "If a judge is uncertain regarding whether any of the waiver procedures are met, he should deny the defendant's request to proceed in propria persona, noting the reasons for the denial on the record. People v Ratliff, 424 Mich 874, 380 NW2d 42 (1986). The defendant should then continue to be represented by retained or appointed counsel, unless the judge determines substitute counsel is appropriate." People v Adkins, supra, 727.

See also Tuitt v Fair, 822 F2d 166, 179 (CA 1, 1987).

The first requirement of an effective waiver of counsel is that the defendant's request must be unequivocal. People v Anderson, supra, 367. This requirement serves two purposes:

> "'First, it acts as a backstop for the defendant's right to counsel, by ensuring that the defendant does not inadvertently waive that right through occasional musings on the benefits of self-representation .. [b]ecause a defendant normally gives up more than he gains when he elects self-representation, we must be reasonably certain that he in fact wishes to represent himself ...
>
> The requirement that a request for self-representation be unequivocal also serves an institutional purpose: It prevents a defendant from taking advantage of the mutual exclusivity of the rights to counsel and self-representation. A defendant who vacillates at trial between wishing to be represented by counsel and wishing to represent himself could place the trial court in a difficult position: If the court appoints counsel, the defendant could, on appeal, rely on his

> intermittent requests for self-representation in arguing that he had been denied the right to represent himself; if the court permits self-representation, the defendant could claim that he had been denied the right to counsel ... The requirement of unequivocality resolves this dilemma by forcing the defendant to make an explicit choice. If he equivocates, he is presumed to have requested the assistance of counsel.' Adams v Carroll, 875 F2d 1441, 1444 (CA 9, 1989)." People v Dennany, supra, 444 (Griffin J.).

A review of the entire colloquy in the instant case indicates that Defendant Williams was equivocal throughout the colloquy. When the trial judge indicated there were "great risks" in representing himself, Defendant appeared to hesitate – "Well, your Honor, I know ya'll could possibly get me another attorney, but it would be another court-appointed attorney." (8a). However, the trial judge quickly dismissed this option – "No, that's not an option. We're in the middle of trial." (8a).

Further, Defendant was equivocal about his request for self-representation during the discussion about whether defense counsel had adequately impeached Mr. Mager. When Defendant indicated that he was concerned that defense counsel had failed to adequately impeach Mr. Mager and the prosecutor pointed out that Defendant's recollection of Mr. Mager's preliminary exam testimony was wrong, Defendant begged for an opportunity to review the page of the preliminary exam transcript mentioned by the prosecutor. Yet, the trial court refused (11a-13a). Defendant clearly did not want to make a final decision about waiving counsel and proceeding on his own without first reviewing the page of the preliminary exam transcript that had been mentioned by the prosecutor:

> "MR. KING: And I only stand, your Honor, not to entertain the defendant, but that is a gross misrepresentation of the preliminary examination transcript. And as all of us saw, including the jury, when we were going over that first portion of the transcript, I think he was trying to bring something to Mr. Cook's attention. Mr. Cook directed me to the page. We both looked. **And there is nothing in that exam**

transcript that indicates he's only fifty percent sure. What he's saying he's taking out of context. And if he reads the whole thing, I think he'll understand why Mr. Cook didn't elaborate with further questioning of the witness.

THE COURT: All right. I'm going to—

THE DEFENDANT: (Interposing) May I read it?

THE COURT: No. I'm going to ask you one more time. Do you want to represent yourself? Because we're bringing in the jury.

THE DEFENDANT: Your Honor, with all due respect –

THE COURT: (Interposing) I asked you one question.

THE DEFENDANT: Your Honor, this is my life.

THE COURT: Do you want to represent yourself?

THE DEFENDANT: Your Honor? Please. I'm pleadin' with you, your Honor.

THE COURT: Answer my question.

THE DEFENDANT: What's a little minute in my life? Please.

THE COURT: Answer my question.

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Let's bring in the jury.

THE DEFENDANT: Your Honor?

THE COURT: Sit down.

THE DEFENDANT: Yes, ma'am.

THE DEPUTY: Sit down.

THE COURT: Remember, you disrupt this courtroom – you disrupt this courtroom one more time and you're going to be out of here. And then I'll bring you back in, and Mr. Cook will be representing you." (12a-14a).

Although the above pleas by Defendant to read the preliminary exam page should have been a "red flag" to the trial judge that Defendant was equivocal about his request to proceed *pro se*, the trial judge ignored the red flags and plowed through with her insistence that Defendant immediately make a decision about self-representation (12a-13a). The Court of Appeals majority below correctly characterized this sequence of events as follows:

> "After the prosecutor suggested that a page from the transcript of the preliminary examination would allay defendant's principal concern that his attorney's performance was deficient, which had to do with his supposed failure to impeach a witness properly, defendant asked the judge for an opportunity to review the page before making a final decision about whether to proceed in propria persona or continue being represented by counsel. The judge refused to allow him to do so, in spite of defendant's repeated and impassioned pleas, in the course of which he asked the judge what the relative importance was of an extra minute being taken in the proceedings compared with the risk of his spending the rest of his life in prison were he wrongly convicted. Because defendant was not permitted to read this page before making this decision, because the trial transcript makes evident that it was a key factor to him in the decisional process and that he had grave concerns about making a decision without verifying the prosecutor's statement from the pretrial examination transcript, and because the preliminary examination transcript indicates that a review of it might well have allayed defendant's concerns about his attorney, we find that defendant's waiver of his right to counsel was not unequivocal, fully knowing, intelligent and voluntary, as required by *Anderson, supra*. Accordingly, we find that defendant's request was denied without due deliberation and without affording him the opportunity to be properly informed before making his decision. Moreover, his request could have been accommodated with minimal inconvenience to the court and only slight delay in the proceedings. Such a cursory handling of defendant's request violated defendant's right to have the proceedings conducted so as to ensure 'that he knows what he is doing and his choice is made with eyes open.' *Id.* at 368. On this basis, we reverse defendant's convictions and remand for a new trial." (20a-21a).

The Court of Appeals majority was justifiably outraged that the trial court here failed to take one minute to grant Defendant's request to read the page of the preliminary examination

transcript. The efforts by Plaintiff-Appellant to label Defendant as manipulative and attempting to create an appellate parachute, are misplaced.[4] This was Defendant's first felony trial (364a-365a). He was not an experienced felon with years of "paralegal training." The concept of creating an appellate parachute was surely not something he was shrewd enough to concoct in the middle of this crisis with his trial attorney. Moreover, Defendant does not fall into the category of defendants seeking to delay the trial. Rather, Defendant Williams specifically told the trial judge that he was not seeking to delay the proceedings (2a). Any attempt to place the onus of this situation on Defendant should be disavowed; rather, the onus should be squarely placed at the feet of the trial judge. Judge Carr's remarks castigating the trial judge in Mitchell v Mason, 325 F3d 732, 749 (CA 6, 2003)(Carr, J. dissenting), are equally applicable to the situation in the instant case:

> "Though my views on the foregoing have been expressed amply in my original dissent, and will not be repeated here, I will repeat the following observation from that opinion, in which I fault the trial court for its inexplicable failure
>
> > 'to have taken the time before commencing a first degree murder trial to inquire effectively into the circumstances and to have ensured that the petitioner's counsel was reasonably well prepared to defend his client. The trial court's failure, in the face of the petitioner's unanswered claims of lack of contact with his attorney and the lawyer's eve-of-trial suspension from practice, to grant a short continuance is, in a

[4] Plaintiff-Appellant expresses concern about defendants using "the competing constitutional rights to create an appellate parachute." Plaintiff-Appellant's Brief on Appeal, p 7. In footnote 10, Plaintiff-Appellant suggests that Defendant Williams "motive to create an appellate parachute is evident from his sudden accusation following his conviction that he was forced to represent himself against his will. (361a)." This comment was indeed made by Defendant at sentencing. It was Defendant's lay opinion summarizing the bottom line of the waiver proceeding at trial. Defendant certainly was not as eloquent as the Court of Appeals' majority, but he at least grasped the concept that the trial court forced him to represent himself against his will. By failing to allow Defendant a few moments to review the page of the preliminary examination transcript and by demanding an immediate answer to her final inquiry as to whether Defendant wanted to represent himself, the trial court did in fact force Defendant to represent himself. Again, having no prior felony record and thus no prior trial or appellate experience, Defendant can hardly be credited with crafting an appellate parachute.

> word, incomprehensible. The compulsion to maintain a tidy docket should never, as it so clearly did here, place fundamental rights at risk. Would a week's delay have really mattered? The message of this case is not that federal courts are quick to intervene into state proceedings; the message is, rather, that the state trial court in this case could and should have done a better job of upholding the Constitution. Had it taken but a few moments to consider the petitioner's complaints meaningfully, or had it postponed the trial for a brief period to make certain that Evelyn was truly ready for trial, this case would not be here. The time the trial court may have saved has led to a great and otherwise unnecessary expenditure of time on the part of the Michigan courts of review, the district court, and this court.' 257 F3d at 580."

In the instant case, the trial judge should have done a better job of upholding Defendant Williams' constitutional right to counsel, and should have taken a few moments to allow Defendant to review the page of the preliminary exam transcript. The trial judge's compulsion to bring the jury back into the courtroom to finish the trial should not have placed Defendant's constitutional right to counsel at risk. Defendant's request was not unreasonable; accommodating his request would not have placed an undue burden on anyone. It is abundantly clear that Defendant did not want to make a final decision about waiving his right to counsel without verifying the prosecutor's statement about the witness' testimony at the preliminary exam. Yet, the trial court ignored Defendant's pleas and the equivocation that surrounded them.

This Court should not be swayed by the attempts of Judge Hoekstra and Plaintiff-Appellant to neatly categorize the waiver colloquy into nice little distinct and supposedly unrelated boxes. In his dissenting opinion below, Judge Hoekstra characterized the proceedings as follows:

> "From my review of the record, I find that this discussion occurred immediately after the trial court had concluded the waiver of counsel procedure required by Anderson, supra, and MCR 6.005(D)(1) and related to how the trial would proceed from that

point forward. The discussion began with defendant's request to have certain witnesses that had previously testified recalled. The prosecutor interjected that there was no point in recalling the witnesses, apparently because their preliminary examination testimony was consistent with their trial testimony. Defendant expressed a desire to review the transcripts before proceeding, but the trial court refused to further delay the trial and ordered the jury returned to the courtroom.

At this point the trial court again questioned defendant about his desire to represent himself and defendant pleaded for more time to review the preliminary examination transcript. It is this exchange between the trial court and defendant upon which the majority focuses, however, it occurred after defendant already had been fully advised of his rights and had stated on the record his unequivocal desire to represent himself. The trial court was not obligated to revisit the issue of defendant's waiver, and the trial court's decision not to grant an adjournment to allow defendant time to review the preliminary examination transcript did not compromise defendant's previous waiver of counsel. In my opinion, this portion of the transcript has no relevance to the waiver of attorney procedure that preceded this exchange.

Regarding the waiver of counsel procedure itself, the record shows that after indicating dissatisfaction with his attorney's cross-examination of prosecution witnesses, defendant made a clear and unequivocal request to represent himself and also made a motion to have two witnesses brought back for additional questioning. However, the issue of recalling witnesses and defendant's desire for self-representation do not, in my opinion, appear to be linked. The trial court, to the extent that it responded to defendant's request to recall witnesses before recessing, indicated only that the rules of evidence would control that decision. The trial court then recessed the case for ten minutes. Upon reconvening, the trial court addressed defendant directly, asking him if he still desired to represent himself, and defendant responded that he did. The trial court then advised defendant of the risks of self-representation, asked him if his decision was made knowingly, intelligently and voluntarily, to which defendant answered affirmatively, warned him about being disruptive, and informed him of the penalties for the offenses for which he was on trial. Under these circumstances, I find that the trial court fully complied with the requirements of Anderson, supra and MCR 6.005(D)(1), and defendant's claim of error is without merit." (22a-23a).

Plaintiff-Appellant in his brief relies on Judge Hoekstra's dissent and also attempts to separate the waiver colloquy into separate and unrelated categories. Plaintiff-Appellant's Brief on Appeal, pp 12-14. Judge Hoekstra ignores that the waiver proceeding spanned the entire seventeen pages and that the waiver proceeding was interspersed with discussions about Defendant's dissatisfaction with defense counsel's cross-examination of witnesses and whether the witnesses would be recalled. Judge Hoekstra incorrectly attempts to dissect the seventeen pages of colloquy into two separate and unrelated parts – the issue of self-representation and the issue of recalling witnesses. The trial court clearly did not view them as separate, as she was still demanding an answer to her question of whether Defendant wanted to represent himself (12a-13a). The waiver proceeding was not concluded at that point either, as the trial court had to correct the sentence information (14a-15a).

A review of the waiver of the right to counsel is to be viewed as a whole. See Walker v Loggins, 608 F2d 731, 734 (CA 9, 1979)(whole record must establish unequivocal demand for self-representation); Tuitt v Fair, supra, 168-171 (extended colloquy revealed that defendant was unwilling to waive right to counsel despite initial request seeming to indicate desire to proceed pro se); Cross v United States, 893 F2d 1287, 1291 (CA 11, 1990)(Defendant's initial statement to the court was sufficiently clear and unambiguous; however, due to dialogue initiated by the defendant, there was compelling record evidence that defendant desired to act as co-counsel, rather than proceed pro se). Reviewing the entire record is not a new concept.

Plaintiff-Appellant also argues that Defendant's request to see the transcript was separate from his request for counsel because 1) Defendant never conditioned his waiver of counsel on his ability to recall Mager or review the transcript, and 2) Defendant did not say he would retain Mr. Cook if the transcript contradicted his memory. Plaintiff-Appellant's Brief on Appeal, p 13.

Although Defendant was not savvy enough to blurt out the term "conditional waiver," a review of his comments makes it clear that in lay terms he was equivocal about waiving counsel if the prosecutor was right about the preliminary examination transcript (12a-13a). Further, during this portion of the proceedings there was no opportunity for Defendant to make it clear that he would retain Mr. Cook if the transcript contradicted his memory, as the trial judge confined him to answering her single question (13a). Finally, at the very beginning of his request to proceed *pro se*, Defendant stated as follows:

> "[By Defendant] But I would like to represent myself, in proper person. And, also, if –
>
> THE DEPUTY: (Interposing) Quiet in the courtroom.
>
> THE DEFENDANT: (Continuing) --if, only if this Court would agree orally, and a written consent, please, that Mr. Florian Mager be brought back to court, and allow me to recross-examine him, as well as Ms. Tracey Jo Williams." (2a).

Although the above may have been inartfully worded, it appears to be an attempt to condition his request for self-representation on the ability to recall Mr. Mager and Ms. Williams.

Plaintiff-Appellant also deems it significant that Defendant's first attorney, Mr. Burgess, "prophesied that defendant did not want to listen to the advice of counsel and instead wanted to try the case himself." Plaintiff-Appellant's Brief on Appeal, p 14. Such musings by previous trial counsel do not suggest that Defendant was intentionally manipulating or attempting to delay the trial. Defendant specifically stated that he did not want a delay (2a).

Furthermore, the record supports an additional reason for the denial of Defendant's request to proceed pro se. Defendant Williams requested both self-representation and standby counsel: "I would also like to keep Mr. Cook as an advisor, and a counselor, if he would accept." (3a). Again, Defendant inartfully worded this request; not understanding the difference

between standby counsel, co-counsel, and hybrid counsel, Defendant asked for Mr. Cook to be both an advisor and a counselor. At the very minimum, Defendant was asking for standby counsel, which rendered his request for self-representation equivocal as a matter of law.[5] In People v Dennany, supra, 446, Justice Griffin, joined by Justices Mallett and Brickley, wrote in the lead plurality opinion that a request for standby counsel renders the request for self-representation equivocal as a matter of law:

> "Because there is no substantive right to standby counsel, the trial court is under no obligation to grant such a request. Consequently, a request to proceed pro se with standby counsel – be it help with either procedural or trial issues – can never be deemed to be an unequivocal assertion of the defendant's right."

In reaching this determination, Justice Griffin noted that the right to counsel and the right to self-representation are "two faces of the same coin" and he noted how other jurisdictions treat a request for standby counsel:

> "The right to proceed pro se and the right to counsel have been described as "'two faces of the same coin,'" because the waiver of one right constitutes the assertion of the other; consequently, 'for purposes of determining whether there has been a deprivation of constitutional rights a criminal defendant cannot logically waive or assert both rights.' United States v Conder, 423 F2d 904, 908 (CA 6, 1970), cert den 400 US 958, 91 SCt 357, 27 LEd2d 267 (1970). Many courts have therefore concluded that a pro se defendant's conditional request to proceed with assistance of counsel, either in the form of hybrid representation or standby counsel, is an equivocal and therefore unacceptable waiver. See United States v Oakey, 853 F2d 551, 552-554 (CA 7, 1988), cert den, 488 US 1033, 109 SCt 846, 102 LEd2d 977 (1989); Tuitt v Fair, supra, p 174 ('[w]hen a defendant refuses to waive his right to counsel, while demanding to proceed pro se, the trial court will find it hard to know which constitutional right is being asserted'); United States v Gaines, 416 F Supp 1047 (ND Ind 1976); State v Gethers, 197 Conn 369, 497 A2d 408 (1985); Russell v State, 270 Ind 55, 383 NE2d 309 (1978); Nagy

[5] Undersigned counsel did not cite this reason in the Court of Appeals below. However, in the event this Court finds that the Court of Appeals majority erred, undersigned counsel submits that the record supports this additional reason for finding that his waiver of counsel was not unequivocal.

> v State, 270 Ind 384, 386 NE2d 654 (1979)." People v Dennany, supra, 444-445 (Griffin, J. plurality).

See also United States v Treff, 924 F2d 975, 979 (CA 10, 1991); Cross v United States, supra, 1291-92; United States v Tarantino, 846 F2d 1384, 1420 (DC Cir, 1988); United States v Mosely, 810 F2d 93, 97 (CA 6, 1987). Cf. State v Brewer, 328 SC 117, 492 SE2d 97 (1997); Scarbrough v State, 777 SW2d 83 (Tex Crim App 1989).

In Dennany, Justice Griffin discussed the important distinction between a defendant asking for standby counsel and a trial court giving a defendant standby counsel:

> "An underlying fault of the Dennany Court's [Court of Appeals] approach is its misinterpretation of Michigan precedent. The Court cites People v Heard, 178 Mich App 692, 444 NW2d 542 (1989), and People v Burden, supra, as proof that 'the assistance of counsel in an advisory capacity [does] not render the defendant's request to represent himself equivocal.' Slip op, p 3. However, those cases make no express reference to the defendant requesting advisory counsel; advisory counsel was simply appointed by the court after the defendant moved to proceed pro se. People v Ramsey, [89 Mich App 260 (1979)] People v Seaton, [106 Mich App 234 (1981)] and People v Gravitt, n 21 supra, [113 Mich App 482 (1982)] all stand for the proposition that a defendant 'cannot have it both ways' and must clearly state he is willing to go it alone. Thus, the Court of Appeals determination that 'while Gravitt, supra, seems to indicate that a request for advisory counsel may make a defendant's request to represent himself equivocal, it is against the great weight of authority' is simply incorrect. Id." People v Dennany, supra, 447 fn 24 (Griffin, J. plurality).

See also People v Adkins, supra, 720 (citing People v Dennany, supra, 442 for proposition that a defendant has a right to counsel or to proceed pro se, but not both).

Justice Boyle, joined by Justice Riley, agreed in Dennany "that a request for standby counsel is not, as a matter of law, an unequivocal assertion of a desire to proceed pro se." 445

Mich at 458. However, they did not agree that it could never be deemed to be an unequivocal assertion of defendant's rights. 445 Mich 468 fn 12.

Recently, in People v Rodney P. Hicks, ___ Mich App ___, 2003 WL 22853050 (CA 239981, 12/2/03)(Wilder, P.J., and Griffin and Gage, JJ.), the Court of Appeals rejected this portion of Justice Griffin's plurality opinion in Dennany. In an opinion authored by Judge Wilder, the Court of Appeals stated:

> "We agree with the first proposition, that there is no substantive right to hybrid representation and that the trial court is under no obligation to grant a request for standby counsel. However, the second proposition, upon which defendant relies to argue that because he requested standby counsel when he announced his desire to represent himself, his request was equivocal as a matter of law, is one that we reject. We note that while Justices Mallett and Brickley concurred with Justice Griffin, the four other Justices deciding Dennany disagreed that a request for standby counsel makes a request for self-representation equivocal." Slip op, p 5.

In footnote 3, the Court in Hicks noted that:

> "four justices, Justice Cavanaugh [sic], joined by Justice Levin, and Justice Boyle joined by Justice Riley, concluded (albeit through differing reasoning in their separate opinions) that a request for standby counsel did not as a matter of law render a request for self representation equivocal." People v Hicks, supra, slip op, p 6 fn 3.

Respectfully, undersigned counsel does not agree with how the Court of Appeals in Hicks calculated the votes in Dennany.[6] The Court of Appeals in Hicks pronounced that the lead plurality opinion of Justice Griffin in Dennany was not binding authority, and the Hicks Court

concluded that "a request for self-representation can be accompanied by a request for standby counsel and maintain its unequivocal nature." Hicks, supra, slip op, p 6. The Court indicated that the trial court could determine whether the defendant is vacillating in his choice or "merely requesting that which, as Justice Cavanagh noted, will likely be granted to the defendant anyway." Id.

Assuming that this Court wants to address this sub-issue,[7] Defendant submits that Justice Griffin's opinion in Dennany is persuasive. Even if this Court adopts the reasoning of Hicks, the record in the instant case is ambiguous, as Defendant Williams requested standby counsel to act as both an advisor and as a counselor. Further, the trial court did not make any express findings, as required. See People v Adkins, supra, 726-727.

The unequivocality requirement was stated as the "first" requirement for a waiver of the right to counsel in People v Anderson, supra, 367. In summary, the waiver of counsel here was not unequivocal. Defendant Williams' ambivalence is only too evident from his entire dialogue with the trial judge. Although Defendant Williams initially requested to proceed *pro se*, as the colloquy progressed and the trial judge advised him of the risks and the prosecutor attempted to correct Defendant's memory of the preliminary exam testimony, Defendant vacillated. Although the trial court's frustration and exasperation are understandable, the trial judge was required to

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[6] As noted above, Justice Boyle, joined by Justice Riley, made it clear in the first paragraph of her opinion in Dennany that she concurred "with the lead opinion in Dennany" and "also agree[d] that a request for standby counsel is not, as a matter of law, an unequivocal assertion of a desire to proceed pro se." People v Dennany, supra, 458 (Boyle, J. concurring in part and dissenting in part). Admittedly it is somewhat confusing how later in footnote 12, Justice Boyle proceeded to find that, "Although I agree with the lead opinion that a request to proceed with standby counsel is not unequivocal as a matter of law, I do not agree that it can 'never be deemed to be an unequivocal assertion of defendant's rights.' Id. At 468 fn 12. Nonetheless, in counting up the votes in Dennany, it is clear that five justices agreed that a request to proceed pro se with standby counsel is not unequivocal as a matter of law.

[7] Although counting the votes in Dennany is relevant in determining whether the Court of Appeals in Hicks should have been bound by Dennany, Defendant Williams understands that this Court has the authority to re-address the issue.

ensure that Defendant's request to proceed *pro se* was unequivocal. In Anderson, this Court understood that a request for self-representation made during trial would necessitate some delay in the proceedings. Anderson, supra, 368. The trial court's failure to ensure that Defendant's request to proceed *pro se* was unequivocal renders Defendant's purported waiver invalid. Thus, the remainder of the trial was conducted in violation of Defendant's constitutional right to counsel.

The Court of Appeals majority below also correctly found that Defendant's waiver of the right to counsel was not fully knowing, intelligent and voluntary (21a). The majority found that "defendant's request was denied without due deliberation and without affording him the opportunity to be properly informed before making his decision. *** Such cursory handling of defendant's request violated defendant's right to have the proceeding conducted so as to ensure 'that he knows what he is doing and his choice is made with eyes open.'" (21a). Further, given the trial judge's rush to proceed with the trial, the trial judge coerced Defendant Williams into choosing to proceed pro se. See People v Dennany, supra, 466 fn 11.

The trial court did not substantially comply with the Anderson requirements. As noted above, there were three instances during the colloquy when Defendant Williams was equivocal. On these occasions, the trial court should have stopped and indicated to the Defendant that his request to waive counsel was not unequivocal. See Adkins, supra, 733 fn 29. Defendant's pleas to review the preliminary exam page were more than mere hesitation (12a-13a). They were clear indications that it was a key factor to him in the decisional process, and that he had grave concerns about making a decision about proceeding *pro se* without verifying the prosecutor's statement about the preliminary exam transcript. See Court of Appeals majority opinion (21a). The trial judge completely disregarded Defendant's pleas to read the transcript page and insisted

that Defendant had to make a final decision immediately. Defendant's case did not involve a momentary hesitation at the beginning of the colloquy; rather, there were instances of equivocation throughout, with Defendant's pleas to read the transcript page occurring at the end of the colloquy. The instant case is not like this Court's decision in People v Suggs (Adkins' companion case), where defendant Suggs initially hesitated but subsequently affirmatively stated his desire to proceed on his own without further equivocation. Adkins, supra, 733 fn 29. Given Defendant's continued hesitation, the trial court should have denied Defendant's request. Anderson was not complied with, substantially or otherwise.

In sum, Defendant Williams' alleged waiver of the right to counsel was not unequivocal, fully knowing, intelligent and voluntary. Furthermore, "the presence of standby counsel does not legitimize a waiver-of-counsel inquiry that does not comport with legal standards." People v Dennany, supra, 446; People v Lane, 453 Mich 132, 138 (1996); United States v Taylor, 113 F3d 1136, 1144 fn 2 (CA 10, 1997). The presence of standby counsel is not an exception to the Anderson or court rule requirements. Dennany, supra, 446.

The remaining question is whether the error here was harmless. Plaintiff-Appellant argues that any error was harmless. Plaintiff-Appellant urges this Court to find that the denial of the constitutional right to counsel was not a fundamental and structural error here because Defendant was not totally deprived of counsel throughout the criminal proceedings and because the error did not pervade the entire proceeding. Plaintiff-Appellant's Brief on Appeal, pp 15-17. Plaintiff-Appellant notes that Defendant was represented by counsel at all stages leading up to trial, that he was represented by counsel "for most of the trial," that the prosecution had already questioned the important identification witnesses and was close to being completed with its entire case-in-chief, and that Defendant had the benefit of standby counsel. Id., pp 15-16.

Plaintiff-Appellant primarily relies on Satterwhite v Texas, 486 US 249, 256 (1988) for this proposition. Id., p 15 fn 31. Defendant submits that Plaintiff-Appellant's argument is incorrect for the following reasons.

It is well established that denial of the right to counsel cannot be harmless error. In Johnson v Zerbst, supra, the United States Supreme Court stated:

> "[T]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the constitution." Johnson v Zerbst, 304 US at 465.

The Court went on to say that because compliance with the Sixth Amendment is an essential jurisdictional prerequisite to a court's authority to deprive an accused of his life or liberty, unless this right is properly waived, a court can have no jurisdiction to proceed to conviction.[8] See also Custis v United States, 511 US 485 (1994); People v Carpentier, 446 Mich 19 (1994).

The ineffective waiver of counsel at trial cannot be deemed harmless error. The very nature of a jurisdictional error mandates reversal without subjecting the violation to harmless error analysis. Torres v Oakland Scavenger Company, 487 US 312, 316 fn 3 (1988) (holding that "a litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court"); Lovelace v Dall, 820 F2d 223, 226 n.3 (CA 7, 1987) ("lack of jurisdiction can not be deemed harmless error."); Solina v United States, 709 F2d 160 (CA 2, 1983) (harmless error analysis is inapplicable where a violation of Johnson v Zerbst, supra, occurred); United States v

Salemo, 61 F3d 214, 221-222 (CA 3, 1995) (invalid waiver of counsel at sentencing not subject to harmless error analysis, as "the purpose and effect of the Sixth Amendment is to 'withhold [ ] from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." Johnson, 304 US at 463"); Glasser v United States, 315 US 60 (1942) (finding that "[t]he right to have the assistance of counsel is too fundamental and absolute to indulge in nice calculations as to the amount of prejudice arising from its denial.") (superseded by statute on other grounds); See also Gideon v Wainwright, supra; Holloway v Arkansas, 435 US 475 (1978); Chapman v California, 386 US 18 (1967).

The issue here cannot be characterized as anything but a Sixth Amendment right to counsel issue. The error here in the waiver of counsel process constitutes a Sixth Amendment right to counsel violation. Defendant Williams has presented a Sixth Amendment right to counsel violation which constitutes a jurisdictional defect not subject to harmless error analysis.

Alternatively, Defendant Williams submits that the error here was a structural error not subject to harmless error analysis. Harmless error analysis applies only to trial errors and not to structural defects. Because structural defects infect the entire trial process, they defy harmless error analysis. Consequently, structural defects require automatic reversal. Brecht v Abrahamson, 507 US 619 (1993); Arizona v Fulminante, 499 US 279, 306-310 (1991); People v Anderson (After Remand), 446 Mich 392, 405-406 (1994); People v Mitchell, 454 Mich 145, 153-155 (1997); People v Duncan, 462 Mich 47, 51-52 (2000). This Court has defined a structural

[8] In one of undersigned counsel's previous cases, People v Alexa, 461 Mich 906 (1999), this Court granted leave to appeal and directed the parties to address "whether the alleged error in the waiver of counsel process amounted to a jurisdictional defect so as to satisfy MCR 6.508(D)(3), and whether, if so, an issue of jurisdictional significance can be subject to harmless error analysis." This Court never decided the issue in Alexa because the prosecutor confessed error and the order granting leave was vacated. People v Alexa, 461 Mich 1002 (2000).

constitutional error as one that constitutes a defect in the constitution of the trial mechanism itself rather than an error in the conduct of the trial, which is amenable to harmless-error analysis in light of the quantum and strength of the untainted evidence. People v Anderson (After Remand), 446 Mich at 406-406 (citing Fulminante, supra, 307-308 and Chapman, supra, 23).

Many constitutional errors can be harmless, but deprivation of counsel at a critical stage of the proceedings is structural, requiring automatic reversal. Gideon v Wainwright, supra; United States v Cronic, 466 US 648, 658-659 (1984); Roe v Flores Ortega, 528 US 470, 483 (2000); French v Jones, 332 F3d 430, 436 (CA 6, 2003); United States v Minsky, 963 F2d 870, 874 (CA 6, 1992); Carter v Sowders, 5 F3d 975, 979 (CA 6, 1993). Error involving waiver of the right to counsel and the right to self-representation is a structural error not subject to a harmless error analysis. See United States v Taylor, 113 F3d at 1144; (application of harmless error analysis is precluded in waiver of counsel cases, as the right to counsel is so basic to a fair trial); United States v Allen, 895 F2d 1577, 1579-80 (CA 10, 1990) (Penson precludes application of harmless error analysis to waiver of counsel cases.); United States v Balough, 820 F2d 1485, 1489-90 (CA 9, 1987)(harmless error approach prohibited by Rose v Clark); United States v Salemo, supra, 221-222 (invalid waiver of counsel at sentencing also not subject to harmless error analysis because involved right basic to a fair trial); United States v Bohn, 890 F2d 1079, 1082 (CA 9, 1989) (denial of Sixth Amendment right to counsel at an in camera hearing not subject to harmless error analysis); Johnstone v Kelly, 808 F2d 214, 218 (CA 2, 1986) (violation of a defendant's right to proceed pro se requires automatic reversal.); Henderson v Frank, 155 F3d 159, 169-171 (CA 3, 1998)(invalid waiver of counsel resulted in deprivation of right to counsel at a suppression hearing, which is one of the structural defects which defy analysis by harmless-error standards); See also Penson v Ohio, 488 US 75 (1988) (the

presumption of prejudice extended to denial of counsel on appeal); Rose v Clark, 478 US 570, 577-578 (1986) ("[h]armless-error analysis ... presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury."); McKaskle v Wiggins, 465 US 168 fn. 8 (1984) (denial of right to self-representation is not amenable to harmless error analysis); Wilson v Mintzes, 761 F2d 275, 286 (CA 6, 1985) (denial of right to counsel of choice, like denial of the right of self-representation, not subject to harmless error analysis); People v Kimber, 133 Mich App 184, 190 (1984) (when counsel is ineffectively waived at trial, it can never be deemed harmless). But see People v Dennany, supra, 468 fn 13 (Boyle, J. concurring in part and dissenting in part); United States v Gipson, 693 F2d 109, 112 (CA 10, 1982); Richardson v Lucas, 741 F2d 753, 757 (CA 5, 1984).

The opinion by the Tenth Circuit in United States v Allen, supra, is persuasive on this question. In Allen, the Tenth Circuit held that failure to conduct pretrial inquiry as to the defendant's knowing and intelligent waiver of his right to counsel rendered his purported waiver of that right invalid, and that the harmless error test did not apply. The Tenth Circuit analyzed the harmless error question as follows:

> "We believe that the Supreme Court's decision in Penson v Ohio, 488 US 75, 109 S Ct 346, 102 L Ed 2d 300 (1988), has now dispelled all doubt about the application of harmless error analysis to invalid waivers of counsel. *** Two key elements in the Court's reasoning control our decision here. First, because the Sixth Amendment violation left petitioner 'entirely without the assistance of counsel,' the Court held that both Strickland's prejudice requirement and Chapman's harmless error analysis are inapplicable. Id. 109 S Ct at 354 (emphasis added). Second, the Court justified this holding by analogizing the need for counsel on appeal to its 'paramount importance' at trial. Id. at 351-52, 354.
>
> We believe that Penson precludes application of harmless error analysis to waiver of counsel cases. Acceptance of an invalid waiver in violation of a defendant's Sixth Amendment rights necessarily

> leaves him 'entirely without the assistance of counsel' at trial." United States v Allen, supra, 1579-1580 (emphasis in the original).

Although the defendant in Allen had the assistance of standby counsel, this did not factor into the Court's decision.

Even accepting Plaintiff-Appellant's argument that the relevant inquiry is whether the error pervaded the entire proceeding, Defendant Williams proceeded *pro se* on the second day of his six day trial (See trial court docket entries at Ia-IIa)(although day three did not involve taking testimony). In Satterwhite v Texas, 486 US at 256-259, the Supreme Court made a clear distinction between Sixth Amendment violations that "pervade the entire proceeding" (i.e. conflict of interest throughout the entire proceeding; total deprivation of counsel throughout the entire proceeding; and absence of counsel from arraignment that affected entire trial because defenses not asserted were lost) and Sixth Amendment violations that are limited to the erroneous admission of particular evidence at trial (i.e. a confession, identification testimony, or a psychological evaluation at trial). The Sixth Amendment violation in the instant case pervaded a significant amount of the trial proceedings. Although Mr. Mager and Ms. Williams had already been questioned before Defendant represented himself, there was still much of the trial to complete. Evidently, Plaintiff-Appellant would have this Court engage in mathematical equations to determine just how much of the trial has to be completed before the Sixth Amendment violation is not pervasive.

Finally, the presence of standby counsel does not render the error harmless either, as the roles of standby counsel and full-fledged defense counsel are fundamentally different. Childress v Johnson, 103 F3d 1221, 1231 (CA 5, 1997).

Defendant Williams is entitled to a new trial.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellee asks that this Honorable Court affirm the Court of Appeals majority opinion and reverse his convictions.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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